Lakeland Bus Lines, Inc. ***and*** **Amalgamated Transit Union, Local 1614, AFL–CIO.** Case 22–CA–21950

August 27, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN, TRUESDALE, AND WALSH

On February 22, 1999, Administrative Law Judge Raymond P. Green issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs, and the Respondent filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order. [1]

The judge found that the Respondent's failure to provide the Union with certain requested financial information did not violate Section 8(a)(5) and (1) of the Act. In its exceptions, the General Counsel argues inter alia that under *NLRB v. Truitt Mfg. Co.*,[2] and its progeny, the Respondent's conduct constituted a claim of an inability to pay, and that accordingly the Respondent was required to provide the Union with the requested financial information necessary to support such a claim. We agree.[3]

Background

The relevant facts are not in dispute. The Respondent, an operator of a private bus service, has had a collective-bargaining relationship with the Union for over 20 years. Its most recent collective-bargaining agreement with the Union expired on January 31, 1997.[4] Negotiations for a successor agreement began in November 1996. The main focus of these negotiations concerned the Respondent's desire for an extended wage freeze and for a modification of the "spread time" rules that would decrease the amount of overtime that the employees could earn on their shift.[5] The Respondent argued that these provisions were needed because the Respondent had lost a significant amount of ridership and revenue.[6]

At the parties' final bargaining session on February 21, the Respondent adhered to its positions concerning the extended wage freeze and the spread time modification, but offered a one-time payment of $500 per employee in exchange for the Union's agreement on the spread time modification. The Union agreed to the wage freeze proposal and the $500 payment, but would not agree to the spread time modification.

On February 25, the Respondent submitted its final offer to the Union, which included the extended wage freeze, the Respondent's spread time proposal, and the $500-per-employee payment. The Respondent's president sent a letter that day to employees detailing the Respondent's position. The letter stated in relevant part:

> [A]s you know, we have lost 7500 riders per week to New Jersey Transit Rail. However, we are attempting to do it with minimal impact on each of the members of our family, i.e., YOU.
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> . . . .
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> [As] those of you who have been around for a while know, I am not one to "cry wolf." I believe in being honest, and that is just what I am trying to do. Simply stated, we are trying to bring the bottom line back into the black and we are doing this by increasing charters, reducing liability insurance costs and negotiating with NJT for additional lines to utilize our manpower and equipment.
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> We are simply all doing what must be done, and now, we are asking for help from our LAKELAND FAMILY so we may retain your jobs and get back in the black in the short term and continue to share our good fortune as we have in the past.
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> Therefore, I ask you to give the enclosed Final Offer your serious consideration and vote YES to ratify it. The future of Lakeland depends on it.

Thereafter, by letter dated February 26, the Union's attorney, John Craner, requested the Respondent to provide financial information. The letter explained that in light

[1] We shall modify the judge's recommended Order in accordance with our recent decision in *Ferguson Electric Co.*, 335 NLRB No. 15 (Aug. 24, 2001.

[2] 351 U.S. 149 (1956).

[3] In view of our finding, set forth below, that this case is distinguishable from *Nielsen Lithographing Co.*, 305 NLRB 697 (1991), affd. sub nom. *Graphic Communications Local 50B v. NLRB*, 977 F.2d 1169 (7th Cir. 1992), we find it unnecessary to pass on the contentions of the General Counsel and Charging Party that *Nielsen* should be overruled.

[4] All dates hereafter are in 1997 unless stated otherwise.

[5] The spread time rules relate to the calculation of the number of hours during the workday for which point the employee is entitled to receive overtime pay. As explained in the judge's decision, if an employee works from 6–9 a.m. and from 4–7 p.m., his total time is 13 hours. If the agreed-upon spread time is 11 hours, his overtime begins after the 11th hour. The Respondent wanted to modify the spread time in order to reduce the amount of overtime pay employees received.

[6] The loss of ridership was due to the fact that State of New Jersey had instituted a rail service that overlapped some of the Respondent's routes. Because that rail service was highly subsidized and quicker than the Respondent's bus service, the loss of ridership was considered to be permanent.

of the Respondent's claims that it was losing money, the Union needed to have its accountant inspect the Respondent's books and records. The letter added that the Union was prepared to sign any confidentiality agreements that the Respondent required in connection with this information.

By letter dated March 11, the Respondent's attorney, Desmond Massey, responded to Craner's letter, stating that the Respondent never took the position that its financial position precluded it from agreeing to the Union's proposal. Massey asserted that "[n]o claim of financial inability" to pay was made by the Respondent, and that under *NLRB v. Truitt Mfg. Co.*, supra, the Union was not entitled to view the Respondent's books. Citing *Nielsen Lithographing Co.*, supra, Massey noted that a claim of sustaining "substantial losses" does not require the Respondent to furnish financial information to the Union.

Craner and Massey exchanged additional letters, dated March 20 and 27 respectively, which repeated their previously asserted positions concerning the Respondent's obligation to furnish financial information to the Union. In addition, during this period the Respondent's employees voted to reject the Respondent's final offer, and on March 28 the Respondent implemented that offer.

The judge found that the Respondent did not violate Section 8(a)(5) and (1) of the Act by refusing to provide the Union with the requested financial information. The judge principally relied on *Nielsen Lithographing Co.*, supra, where the Board held that a claim of competitive disadvantage was not the equivalent of a claim of a present inability to pay and thus did not trigger an obligation to provide the union with requested financial information. The judge found that although the Respondent referred during the negotiations to a loss of ridership and corresponding revenue, it never claimed that it was unable to pay anything more than what it had finally offered. Therefore, the judge found it was not obligated to supply the Union with information to substantiate its claim.

The judge distinguished several cases, issued after *Nielsen*, where the Board found an employer obligated to furnish financial information because its comments during negotiations amounted to a claim of an inability to pay. The judge found that *Shell Co.*, 313 NLRB 133 (1993), was not controlling because the employer in that case told the union that its circumstances were bad and a matter of survival. Acknowledging that a claim that circumstances are a matter of survival is tantamount to a claim of a present inability to pay, the judge found this case distinguishable because the Respondent had not claimed that its survival was at stake.

The judge similarly distinguished the Board's decisions in *Stroehmann Bakeries Inc.*, 318 NLRB 1069 (1995), enf. denied 95 F.3d 218 (2d Cir. 1996), and *ConAgra, Inc.*, 321 NLRB 944 (1996), enf. denied 117 F.3d 1435 (D.C. Cir. 1997), on the basis that the employers in those cases claimed greater financial difficulties than the Respondent here. The judge noted that *Stroehmann* involved an employer's claim that it suffered huge losses that were projected to continue and that it remained in business only due to the deep pockets of its parent company, and *ConAgra* involved an employer's claims that "the situation is serious and fragile," that "if we are not competitive we cannot survive," and that "we must do something to be able to survive." The judge found that there were no similar claims made by the Respondent.

In sum, the judge found that the Respondent had not said anything that could be construed as tantamount to a claim of inability to pay, and thus was not obligated to furnish the requested financial information. Alternatively, to the extent that the Respondent's words could be construed as a claim of an inability to pay, the judge found that any such claim was retracted by the Respondent's response to the Union's request for financial information. Accordingly, the judge found that the Respondent's refusal to provide the financial information was not unlawful. Further, the judge found that the refusal to provide the financial information did not preclude a valid impasse, and thus the Respondent's unilateral implementation of its final offer was not violative of the Act.

Analysis

Contrary to the judge, and in agreement with the General Counsel, we find that the Respondent was obligated to furnish the requested financial information to the Union. For the reasons set forth below, we find that under *Truitt*, supra, and its progeny, the Respondent's February 25 letter to employees effectively communicated that it was unable to afford to pay anything more than that contained in its final offer.[7]

[7] We reject the Respondent's contention that under *Burrus Transfer*, 307 NLRB 226 (1992), the Respondent's statements cannot trigger an obligation to furnish financial information because they were made away from the bargaining table. In *Burrus*, the Board found that an informal statement by the respondent's vice president to an employee that he could not afford to pay employees any more than they were already making—made 4 to 6 months prior to the commencement of contract negotiations—did not undercut the respondent's claim during negotiations of a competitive disadvantage. The Board's finding was based on the fact that the comment was not linked to any economic proposal, not that the comment was made away from the bargaining table. Conversely, the Respondent's comments in its February 25 letter

In *Truitt*, the Supreme Court held that an employer violated Section 8(a)(5) of the Act by refusing to provide the union with information requested to substantiate the employer's claim that it could not afford to grant its employees a wage increase of 10 cents an hour sought by the union, claiming that an increase of more than 2-1/2 cents an hour would put the employer out of business. In holding that its refusal to provide the information necessary to substantiate the claim of inability to pay was unlawful, the Court explained that

> Good-faith bargaining necessarily requires that claims made by either bargainer should be honest claims. This is true about an asserted inability to pay an increase in wages. If such an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of accuracy. [351 U.S. at 152–153.]
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> We do not hold, however, that in every case in which economic inability is raised as an argument against increased wages it automatically follows that the employees are entitled to substantiating evidence. Each case must turn on its particular facts. The inquiry must always be whether or not under the circumstances of the particular case the statutory obligation to bargain in good faith has been met. [351 U.S. at 153–154.]

In *Nielsen Lithographing Co*., supra, the Board held that *Truitt's* requirement that an employer furnish financial information necessary to verify a claim of inability to pay did not apply to an employer's claim that maintaining existing employee benefits was necessary to avoid placing the employer at a competitive disadvantage. In that case, the employer acknowledged that it was still making a profit, and thus it was not pleading poverty or an inability to pay, but maintained that concessions were necessary in order to be competitive in the future. The union requested certain information it deemed necessary to evaluate the claim that the employer was losing its ability to compete. The employer refused to supply this information.

Following the Seventh Circuit's opinion in *NLRB v. Harvstone Mfg. Corp*.,[8] the Board found that the employer's claim of competitive disadvantage was not the same as a claim of financial inability to pay. The Board reasoned as follows:

> The difference between the two types of claims is critical. The employer who claims a present inability to pay, or a prospective inability to pay during the life of the contract being negotiated, is claiming essentially that it cannot pay. By contrast, the employer who claims only economic difficulties or business losses or the prospect of layoffs is simply saying that it does not want to pay. . . . The distinction [of *Truitt*] has always been between claims of "can not" and "will not." [305 NLRB at 700.]

The Board cautioned, however, that an employer's claims must be evaluated in the context of the particular circumstances in that case. The Board stated:

> We do not say that claims of economic hardship or business losses or the prospect of layoffs can never amount to a claim of inability to pay. Depending on the facts and circumstances of a particular case, the evidence may establish that the employer is asserting that the economic problems have led to an inability to pay or will do so during the life of the contract negotiated. [Id.]

Applying this reasoning, the Board held in *Shell Co*., 313 NLRB 133 (1993), that an employer's duty to disclose relevant financial information was triggered by its claims that its present circumstances were "bad" and a matter of survival," that it was "losing business," and "faced serious regulatory and cost problems." Consistent with the Board's acknowledgement in *Nielsen* that certain claims of economic hardship and business losses could amount to a claim of inability to pay, the Board held in *Shell* that the employer had effectively made such a claim. The Board noted that, unlike the claims at issue in *Nielsen*, there was no claim that the employer was still making a profit, and the thrust of the employer's assertions was its present economic circumstances rather than future economic competitiveness. The Board concluded that in these circumstances the employer's assertions amounted "to a claim that it could not afford the most recent contract," and thus warranted a finding that the employer had pleaded a present inability to pay. Id. at 133–134.

We find, contrary to the judge, that the Respondent's remarks, specifically those contained in its President's February 25 letter to employees urging them to accept the final offer, are essentially equivalent to those that were at issue in *Shell Co.* Consistent with the Board's finding in *Nielsen* that certain claims of economic hardship can indeed amount to a claim of inability to pay, the

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to employees were solely linked to its final offer, and were made in an attempt to persuade employees to accept that offer.

[8] 785 F.2d 570 (1986), denied enf. 272 NLRB 939 (1984). In that case the Seventh Circuit denied enforcement of the Board's order and found that the employers' request for concessions based on a claim of competitive disadvantage was not a plea of an inability to pay and thus the employers' refusal to furnish the requested financial records was not unlawful.

statements in the letter reasonably convey that the Respondent was unable to pay more than that contained in the final offer. Specifically, the Respondent stated that it was "trying to bring the bottom line back into the black," that acceptance of the final offer would enable the Respondent to "retain your jobs and get back in the black in the short term," and that "[t]he future of Lakeland depends on it." In context, these statements are the equivalent of the claim in *Shell Co*. that circumstances were bad and were a matter of survival. In both cases, the statements reasonably conveyed a present inability to pay.

We find especially significant the Respondent's reference in its letter to the need to "get back into the black in the short term." That statement, when considered together with the Respondent's repeated assertions that it was losing money because of the lost ridership, is reasonably construed as a statement that the Respondent was presently unprofitable and as such was unable to pay more than that contained in its final offer. Further, by combining that statement with the references to "retain[ing] your jobs" and the Company's "future" being dependent upon acceptance of the final offer, the Respondent emphasized in no uncertain terms that, like the employer in *Shell Co*., its short-term economic survival rested upon acceptance of its proposal. Also as in *Shell Co*., and unlike *Nielsen*, the Respondent did not qualify any of its claims with statements suggesting that it continued to be profitable or that despite the loss of revenue there existed some alternative means of paying more than its final offer. Accordingly, the Respondent's statements in its February 25 letter could only be construed as a claim of an inability to pay, which triggered a duty to disclose relevant financial information under *Truitt*.[9]

We also disagree with the judge's reasoning that the statements of the employers in *Stroehmann Bakeries, Inc.* supra, and *ConAgra, Inc.*, supra, amounted to claims of greater financial difficulties than those made by the Respondent here. By asserting its need to get "back into the black in the short term," and that its "future" depended upon the acceptance of its final offer, the Respondent conveyed a sense of immediacy to its economic concerns. Its claims thus constituted an expression of a present inability to pay that was equally as alarming as, if not more so than, the statements in *Stroehmann Bakeries* concerning the huge losses and the inability to go on absent the deep pockets of the parent company, or the claim in *ConAgra* that the situation was "serious and fragile" and that "we must do something to be able to survive."[10]

We recognize that the courts of appeal did not enforce the Board's orders in those two cases. The courts' decisions, however, raised concerns that are not present here.

In *Stroehmann Bakeries, Inc. v. NLRB*, 95 F.3d 218 (2d Cir. 1996), the Second Circuit disagreed with the Board that a claim of inability to pay was made by the employer's statements that it had suffered huge financial losses and that the parent company's "deep pockets" would not continue to fund the employer's operations absent deep concessions from the union. The Second Circuit specifically took issue with the Board's finding that the employer's reference to the "deep pockets" of the parent company could reasonably be construed as an inability to pay. Rather, the court found that the statement showed that the employer had access to capital sufficient to continue its operations, and thus the employer's statements communicated its view that it would not, as opposed to could not, pay the present contractual rates. 95 F.3d at 223. In this case, there is no evidence similar to that in *Stroehmann* that could be construed as a claim by the Respondent that it had other means, such as the deep pockets of a parent company, to cover the loss of revenue. To the contrary, the Respondent's statements, as mentioned above, clearly conveyed that it had no alternative to get back in the black. These statements thus express a *present* inability to pay anything greater than its final offer. Accordingly, the concerns raised by the Second Circuit's decision are not present in the instant case.

Similarly, in *ConAgra, Inc. v. NLRB*, 117 F.3d 1435 (D.C. Cir. 1997), the District of Columbia Circuit held that the employer's comments in support of its demand for a wage and benefit reduction did not amount to a claim of inability to pay because the employer's comments were made as part of an expression of its concerns

[9] Our dissenting colleague contends that the instant case is distinguishable from *Shell Co.* because the Respondent's reference to the need to "get back in the black in the short term" carries a far different message than the employer's claim in *Shell Co.* that conditions were "critical" and a "matter of survival." While agreeing that the claims in *Shell Co.* are tantamount to a claim of inability to pay, the dissent claims the Respondent's statements are ones that "reassured employees." In making this claim, the dissent ignores the fact that any sense of reassurance was solely contingent upon acceptance of the final offer, and fails to consider that the Respondent's references to getting "back in the black" were made together with statements linking acceptance of the final offer to the retention of employees' jobs and the "future" of the Company. When considered together and in context, the statements in the February 25 letter create the clear impression that not only is the Respondent unprofitable, but things are indeed critical and a matter of survival. Nothing in that letter suggests a contrary message.

[10] We disagree with our dissenting colleague's suggestion that *ConAgra* is distinguishable, in part, because the employer in that case announced the layoff of 40 employees and warned that the employer could ship its product directly to Puerto Rico. These statements, in essence, communicate the same message as the Respondent's reference to its future ability to "retain" employees' jobs and that the "future" of the Respondent was at stake, i.e., that acceptance of the final offer was necessary for the Company's economic survival.

about its continued ability to be competitive, which under *Nielsen* does not trigger an obligation to furnish financial information. Id. at 1443. Significantly, the court found the circumstances in *ConAgra* to be more like that in *Nielsen* than in *Shell Co.* because the employer repeatedly stated that it remained profitable. Id. The court thus found that the employer's claims about its need for concessions, when considered in context, were not expressions about the immediacy of a present inability to pay, but rather were merely expressions about its concern for its ability to remain competitive in the future. Id.[11] In contrast, here the Respondent's February 25 letter did convey a sense of immediacy to its claim that its economic circumstances precluded it from paying anything more than its final offer. The letter explained that acceptance of the final offer was one of several immediate changes that had to be made because of the lost ridership and revenue. And unlike the employer in *ConAgra*, the Respondent never qualified its concerns with statements suggesting that it remained profitable despite the loss of revenue.[12] To the contrary, it strongly suggested that it was not profitable by repeatedly stressing the need to "bring the bottom line back into the black." Moreover, the Respondent's comments about the loss of revenue were not raised in the context of any concerns about remaining competitive in the future, as in *ConAgra*. Rather, the Respondent's loss of revenue was portrayed as permanent, and its proposals were premised on its immediate need to make up for this permanent loss.

We also find no merit to the judge's finding that even if the Respondent's words were tantamount to a claim of inability to pay, the Respondent retracted that claim when its attorney responded to the Union's request for information.[13] In its letter responding to the Union's information request, the Respondent's attorney, Desmond Massey, *denied* that the Respondent had made either an "explicit or implicit" claim of financial inability to pay. He did not make any reference to the statements contained in the February 25 letter, let alone offer a retraction of those statements. Indeed, a retraction of a particular statement, by its very nature, implies an acknowledgement that the statement was made. Massey's letter completely ignores the claims made in the February 25 letter and instead merely denies that the Respondent has ever claimed an inability to pay. It does not communicate a retraction of any such claim.[14]

In sum, we find that the statements made in the Respondent's February 25 letter to employees, when considered in the context of the Respondent's repeated assertions during negotiations about its loss of ridership and revenue, effectively communicated a claim of a present inability to pay anything more than that contained in its final offer, and that this claim triggered an obligation to furnish the Union with the requested financial information. Accordingly, the Respondent's refusal to furnish the requested financial information violated Section 8(a)(5) of the Act. It is uncontested that the Respondent's financial condition was a central issue in the negotiations, as it related to the economic proposals on which the parties could not agree. Accordingly, the Respondent's implementation of its final offer was likewise unlawful because the failure to furnish the requested information precluded the parties from reaching a valid impasse.

ORDER

The National Labor Relations Board orders that the Respondent, Lakeland Bus Lines, Inc., Dover, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to provide Amalgamated Transit Union, Local 1614, AFL–CIO with financial information requested in its letter dated February 26, 1997.

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[11] The D.C. Circuit also alluded to the issue of whether *Shell Co.* could be reconciled with *Nielsen*, but then proceeded to resolve that issue by noting that the Board explicitly reconciled the two decisions in *Shell Co.* by finding that the statements in *Nielsen* referring to the fact that the respondent was still making a profit were not present in *Shell Co.*, 117 F.3d at 1443.

[12] We note that even the judge acknowledged that these repeated assertions of a loss of revenue in these circumstances could reasonably be construed as meaning that the Respondent was not profitable.

[13] We find no merit to the dissent's contention that there are no exceptions to the judge's finding that the Respondent retracted its claim of inability to pay. The General Counsel excepted to the judge's finding that the Respondent did not violate Sec. 8(a)(5) by failing to provide the Union with the requested financial information. Clearly, this exception includes the issue of whether the claim was retracted. It defies logic to construe the General Counsel's exceptions as applicable only to the issue of whether a claim of inability to pay was made, but not to the finding that one was withdrawn. Because any reasonable construction of this exception leaves no doubt that it encompasses the judge's finding that the claim was retracted, we do not agree with the dissent that the exception is so lacking in specificity that it warrants a finding, under Sec. 102.46 of the Board's Rules, that there are no exceptions applicable to this issue.

[14] We thus find that *Central Management Co*., 314 NLRB 763 (1994), cited by the judge, is distinguishable. Unlike the Respondent's attorney, the employer there did not deny having made a claim of inability to pay. Rather, the employer clearly stated that it "does not claim inability to pay." The union, in turn, admitted that the employer was no longer claiming inability to pay. Citing this admission, the Board found that the employer's "withdrawal of its claim was effective." Here, there was neither a clear retraction by the Respondent, nor a corresponding acknowledgement by the Union. In any case, Massey's letter is better understood less as a change in the Respondent's bargaining position—which we have found was based on a claim of inability to pay—than as an attempt to justify its refusal to provide financial information to the Union. On the record as a whole, we believe that Respondent clearly failed to bargain in good faith.

(b) Refusing to bargain in good faith with the Union by implementing unilateral changes in employees' terms and conditions of employment without first having reached a valid impasse in bargaining with the Union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative necessary to effectuate the policies of the Act.

(a) Provide the Union with the financial information requested by its letter dated February 26, 1997.

(b) On request of the Union, rescind all unilateral changes in terms and conditions of employment implemented on March 28, 1997, and restore all terms and conditions of employment as they existed prior to the March 28, 1997 implementation, making whole employees adversely affected pursuant to *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Dover, New Jersey, copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 11, 1997.

[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certificate of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 27, 2001

Wilma B. Liebman, Member

John C. Truesdale Member

Dennis P. Walsh Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN HURTGEN, dissenting.

The judge found that the Respondent did not violate Section 8(a)(5) the Act by refusing the Union's request for financial information.[1] Relying on *Nielsen Lithographing Co*., 305 NLRB 697 (1991), affd. sub nom. *Graphic Communications Local 50B v. NLRB*, 977 F.2d 1169 (7th Cir. 1992), the judge found that inasmuch as the Respondent did not claim that—either during negotiations, or during the term of the contract being negotiated—it was *unable* to pay the wage increase sought by the Union, the Respondent was not required to provide the requested information. My colleagues reverse. They do not reach the central argument raised by the General Counsel and Charging Party, i.e. that the Board should overrule *Nielsen*. However, the majority seeks to achieve that result by purporting to distinguish the instant case from *Nielsen*. I reject their efforts and find that *Nielsen* governs. Applying *Nielsen*, I find that, because the Respondent never expressly or implicitly pled an inability to pay the wage increase that the Union sought in negotiations, the Union was not entitled to the requested financial information. Accordingly, I would dismiss the 8(a)(5) information allegation. Further, as the General Counsel concedes that absent this 8(a)(5) violation, the subsequent impasse was lawful, I would additionally dismiss allegations that the Respondent made unlawful unilateral changes when implementing its bargaining proposals after impasse.

[1] Because he found that the Respondent did not violate the Act in this regard, the judge additionally recommended dismissing allegations that the Respondent violated Sec. 8(a)(5) by thereafter implementing its final bargaining proposal after impasse.

Legal Principles

It is well settled that an employer is required to provide the exclusive bargaining representative of its employees with requested information that is relevant to that representative's proper performance of its duties. *NLRB v. ACME Industrial Co.,* 385 U.S. 432, 435–436 (1967). It is equally well established, however, that information about the financial condition of the employer is not presumptively relevant. *Nielsen Lithographing*, 305 NLRB at 699. As stated in *ConAgra, Inc. v. NLRB*, 117 F.3d 1435, 1438 (D.C. Cir. 1997):

> Although the relevance of information concerning the terms and conditions of employment is presumed, see *Ohio Power Co.*, 216 NLRB 987 (1975), no such presumption applies to an employer's information regarding its financial structure and condition, and a union must demonstrate that any requested financial information is relevant to the negotiations in order to require the employer to turn it over. See *International Woodworkers v. NLRB*, 263 F.2d 483, 485 (D.C. Cir. 1959).

See also *United Steelworkers Local 14534 v. NLRB*, 983 F.2d 240, 243 (D.C. Cir. 1993).

In order to meet its burden of proving relevance, the union must establish that the employer has claimed that it is financially unable to pay the amounts proposed by the union in negotiations. *NLRB v. Truitt Mfg. Co.,* 351 U.S. 149 (1956).

In *Nielsen Lithographing,* the Board defined the "inability to pay," which triggers the employer's obligation to provide requested financial information. The Board said:

> [A]n employer's obligation to open its books does not arise unless the employer has predicated its bargaining stance on assertions about its inability to pay during the term of the bargaining agreement under negotiation. [Footnote omitted.]
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> . . . .
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> By contrast, the employer who claims only economic difficulties or business losses or the prospect of layoffs is simply saying that it does not want to pay.

305 NLRB at 700.

In enforcing the Board's *Nielsen* decision, the Seventh Circuit elaborated on the term "inability to pay." The court noted that Nielsen sought concessions in bargaining to reduce its labor costs. However, the court said that:

> [Nielsen] did not base the demand on any claim that it was in financial jeopardy, strapped for cash, broke or about to go broke, unprofitable, or otherwise unable to pay the existing level of wages and fringe benefits.
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> If the employer claims that it cannot afford to pay a higher wage or, as here, the existing wage, the union is entitled to demand substantiation in the employer's financial records . . . But there isn't a hint of that here . . . All that Nielsen was claiming was that if it didn't do anything about its labor costs it would continue to lose business and lay off workers. It didn't claim that it was in any financial trouble.

Graphic Communications Local 508 v. NLRB, 977 F.2d 1168, 1168 and 1170 (7th Cir. 1992). Because Nielsen was not claiming a financial inability to pay, the court concluded that the union knew everything it needed to know for purposes of bargaining, and to decide whether to pursue economic action (i.e., call a strike). Id. at 1171.

In subsequent cases, the Board and courts have made clear that only when a present inability to pay has been asserted will the union be entitled to requested financial information from the employer. For example, in *Shell Co.*, 313 NLRB 133 (1993), the Board found that an employer's claims that conditions were "very bad[]," "critical," a "matter of "survival," and that "we need your help, your assistance, because of this condition," were tantamount to a claim of present inability to pay, and triggered the obligation to provide requested financial information. Conversely, where the employer merely states that it is "having trouble staying afloat,"[2] the "well has run dry,"[3] or "claims only general economic difficulties or business losses" as the reason for its position, the employer may lawfully refuse to hand over financial information." *Nielsen*, 305 NLRB at 700, discussed in *Stroehmann Bakeries, Inc. v. NLRB*, 95 F.3d 218, 222 (2d Cir. 1996). Nor will an employer be required to open its books to the union on the basis of the employer's contentions that "its financial condition is bleak, or that it is suffering losses, or encountering economic difficulties." *Wisconsin Steel Industries*, 318 NLRB 212, 224 (1995).

When determining whether an employer is claiming a present inability to pay in bargaining, the Board looks not at isolated words, but at the record as a whole. In *Burruss Transfer,* 307 NLRB 226 (1992), the employer had informed the union, months before negotiations commenced, that it could not afford to pay employees

[2] *Torrington Extend-A-Care Employee Assn. v. NLRB*, 17 F.3d 580, 587 (2d Cir. 1994).

[3] *Genstar Stone Products Co.*, 317 NLRB 1293, 1298 (1995).

more than they currently were making. And, during negotiations, the employer informed the union that: it did not feel it could pay the Union's health care proposal; its Dun & Bradstreet report "paint[ed] an entirely different picture" than the union's claim that the employer could meet its economic demands; and, if it paid what the union had proposed, it "would not be able to survive." Despite these broad statements, the Board held that Burruss was not required to provide the requested financial information because the overall tenor of its statements in bargaining was only that it would be competitively disadvantaged by the union's bargaining proposal, and not that it was presently unable to meet the union's bargaining demands.

The Board has further held that where—in conjunction with its claims of financial difficulties—the employer makes clear that it is not pleading poverty or an inability to pay, no obligation to provide information will be found. See, e.g., *Genstar Stone Products*, supra. Finally, even where an employer initially claims an inability to pay, if it subsequently makes clear that it is neither claiming poverty nor a present inability to pay, the Board will not require the employer to open its books to the union. *Central Management Co*., 314 NLRB 763, 768–769 (1994).[4]

Instant Case

Preliminarily, it is important to note what is *not* in issue in this case. As stipulated by the General Counsel, this is *not* a case where the Respondent—at any time during contract negotiations—specifically claimed an inability to pay what the Union proposed in contract negotiations. Nor is it a case where the Respondent ever claimed that it was unprofitable. Rather, the General Counsel alleges, and my colleagues find, that the Respondent effectively pled poverty. Like the judge, I strongly disagree.

The parties' contract was set to expire in January 1997. Before negotiations commenced in November 1996 for a successor agreement, the Respondent lost 500 daily round trip bus fares to a competitor—a newly created, subsidized rail line service. This competition and loss of revenues was known to the Respondent, the Union, and employees prior to negotiations. Indeed, the Union conceded that it knew that the Respondent had been hurt competitively by the new rail line.

In negotiations for a new agreement, the Union initially proposed a wage increase. The Respondent, citing lost revenues attributable to the rail line competition, conversely sought, among other things, a wage freeze and a change in the "spread time rules."[5] The parties engaged in 11 bargaining sessions, including a final meeting on February 21, 1997. During these sessions, the Respondent frequently referred to its lost ridership. However, as credited by the judge, at no time during bargaining did the Respondent claim that it was unable to meet the Union's bargaining demands. Neither did the Union request financial information from the Respondent during these bargaining sessions.

By the February 21 bargaining session, agreement had been reached on many issues. The major remaining sticking point was the Respondent's proposal to increase the spread time from 11 to 11-1/2 hours before overtime would be paid.[6] In the face of the Union's opposition, the Respondent submitted a proposal which included an 11-1/2 hour spread-time provision, but also provided a $500 one-time payment to the affected drivers, to offset their loss of overtime pay.[7] At the February 21 session, the Union agreed to the Respondent's proposed wage freeze and the $500 payment, but continued to insist on the 11-hour spread-time provision.

On February 25, the Respondent submitted its final offer to the Union. On the same date, the Respondent's president wrote the unit employees, stating that:

> I am sure that at some time in your personal lives you have had setbacks that have forced you to reevaluate your manner of running your household, readjust you expenses and cut back on your day to day expenses as well as ask for the cooperation of each member of your family.
>
> Well, here at your Lakeland family, MIDTOWN DIRECT has made us do just that. As you know, we have lost 7,500 riders per week to New Jersey Transit Rail. However, we are attempting to do it with

[4] In two cases where the Board found that the employers' comments in bargaining were tantamount to claims of present inability to pay under *Nielsen*, reviewing courts disagreed. *Stroehmann Bakeries, Inc*., 318 NLRB 1069 (1995), enf. denied 95 F.3d 218 (2d Cir. 1996); *Con-Agra, Inc.,* 321 NLRB 944 (1996), enf. denied 117 F.3d 1435 (D.C. Cir. 1997). As discussed below, I agree with the judge that those cases are factually distinguishable from this one. Thus, it is unnecessary for me to pass on the courts' views, other than to note a judicial hostility to the Board's attempts to distinguish *Nielsen*.

[5] About half of the Respondent's busdriver employees worked split shifts, where their working hours sandwiched several nonwork hours. "Spread time rules" refer to the amount of total hours—work and nonwork—after which a split-shift driver would be entitled to overtime pay. Under the expiring contract, overtime was available after 11 hours. The Respondent sought in negotiations to increase the amount of time before overtime would be paid.

[6] The Respondent previously had proposed that drivers work longer periods of time before overtime would be paid, but it reduced its proposal in the course of bargaining.

[7] The $500-per-driver figure (or roughly $50,000 total) reflected the Respondent's estimate of the cost differential, over a year's time, between an 11 and 11-1/2-hour spread-time provision.

> minimal impact on each of the members of our family, i.e. YOU.
>
> I know there are many skeptics among us who feel the job could be done better and, if this is so, we ask that you come to us personally rather than send anonymous suggestions and criticisms so that all of us may see why and where such ideas are coming from and how much weight these communications carry.
>
> In today's environment, it seems all we hear about the large corporations are "DOWNSIZING" and most of them do not take into consideration employee seniority and loyalty. Their only objective is to eliminate jobs so their bottom line gets fatter, at the expense of all the employees who should matter most.
>
> Well, this is not my style nor was it ever Bernie's way of doing things. In all of the years of operation, even the ones that were not so good, we always managed to give what we could to our employees. If we had not had this philosophy, you would not be the highest paid private sector busdrivers in the United States, or have the outstanding pension, health plan and many of the fringe benefits, that we all enjoy today.
>
> [As] those of you who have been around for a while know, I am *not* one to "cry wolf." I believe in being honest, and this is just what I am trying to do. Simply stated, we are trying to bring the bottom line back into the black and we are doing this by increasing charters, reducing liability insurance costs, and negotiating with NJT for additional lines to utilize our manpower and equipment. Please do not think the whole burden rests on your shoulders.
>
> We are simply all doing what must be done, and now, we are asking for help from our LAKELAND FAMILY so we may retain your jobs and get back in the black in the short term and continue to share our good fortunes as we have in the past.
>
> Therefore, I ask you to give the enclosed *Final Offer* your serious consideration and vote *YES* to ratify it. The future of Lakeland depends on it.

On February 26, the Union wrote the Respondent, stating that it could not understand Respondent's claim that it was losing money due to rival rail line transportation while simultaneously offering $500 to employees affected by the contractual spread-time provision. The Union requested that the Respondent provide it with company books and records so that the Union could ascertain the extent of loss, if any, that the Respondent had sustained.

On March 11, the Respondent wrote the Union, denying its request for information. The Respondent stated that

> No claim of financial inability, explicit or implicit, was made by [Respondent's counsel] or any company official, nor does your letter, on its face, assert that any Lakeland official/spokesperson made such a representation. Indeed, if the Company was positing that it "could not pay," it would have hardly offered the $500 per man lump sum bonus in exchange for the Union's agreement on the 11.5 hour "spread".

Accordingly, the Respondent wrote that, under *Truitt* and *Nielsen Lithographing*, the Union was not entitled to the requested financial information.

On March 20, the Union renewed its request for the financial information stating:

> [We] feel that we have every right to inspect the Company books and records since you are, in reality, taking the position that [Respondent] is losing money and that is the reason why it seeks a twenty-one month wage freeze and a reduction in wages through the increase in spread time.

In its March 27 reply, the Respondent reiterated that at no time had it claimed a present inability to pay or an inability to pay during the life of the contract under negotiation. The Respondent further stated that because the Union's sole claim of entitlement to company records was based on the Respondent's assertion that it was "losing money," the Union had no legal right to examine its books.

Following employee rejection of its final offer, the Respondent implemented the offer about March 28, 1997.

Analysis

Based on these facts, and the applicable legal precedent, I agree with the judge that the Respondent did not violate Section 8(a)(5) when it refused the Union's request for financial information. The Respondent *never* claimed that it could not pay employees what the Union had proposed in negotiations. The Respondent merely stated that it had sustained loses in ridership due to a new rail transportation line. As in *Nielsen*, such claim of "business losses" did not trigger the Respondent's obligation to provide information. Further, the fact that the Respondent offered, as part of its February 21 bargaining proposal, a $500 one-time payment to its split-shift drivers made clear that it was not claiming an inability to pay. My colleagues rely particularly on the Respondent's articulated desire to "get back into the black in the short term." Concededly the phrase implies that the Respondent was losing money. However, there is a clear distinction between "losing money" and "an inability to pay". A company can be losing money and yet have sufficient assets to weather the storm for several years. In the instant case, the Respondent may well have been "losing money", and it clearly wanted to reverse this as soon as possible, but it never claimed that it had insufficient assets to meet the Union's demands for the term of a contract. To the contrary, its statements and actions (e.g., the $500 offer) were precisely the other way.

Nor is this a case like *Shell Co.* where the employer claimed that conditions were "critical" or a "matter of survival." On the contrary, the Respondent reassured employees in its February 25 letter that it was taking concrete steps to make up for revenues lost to rail ridership, that it was not eliminating jobs, and that it was striving "to get back in the black in the short term" so that it could "continue to share our good fortunes as we have in the past." These statements, unlike those in *Shell Co*., were not tantamount to a claim of inability to pay.

Moreover, while my colleagues pay lip service to the claim that the statements in the February 25 letter should be "considered together and in context," they fail to do so. Honing in on references to "get[ting] back in the black," and the "future" of the company, they ignore the overall tenor of the letter which demonstrates the Respondent's efforts to recoup lost revenues with minimal impact on employees, so that the employees could continue to share in the Company's historic good fortunes. The fact that the Respondent exhorts employees in the letter to accept its bargaining proposal as a means of facilitating this result in no way signals that conditions are either "critical" or "a matter of survival", as was claimed in *Shell Co*. Further, as indicated above, there is a difference between a need to get "back in the black" and an inability to pay. The former indicates current losses. The latter indicates a lack of assets.

My colleagues also argue that the text of the Respondent's February 25 letter constituted a claim of inability to pay "equally as alarming . . . if not more so" than the employer statements in *Stroehmann Bakeries, Inc*., supra, and *ConAgra, Inc*., supra. I find no support for the contention. Thus, nothing in the February 25 letter is comparable to Stroehmann's claims that: it has suffered "huge" projected losses that were "disastrous" for its "profitability;" "the Company could have gone out of business." Nor does this letter convey the message of the employer in *ConAgra* that: "the situation is serious and fragile," "if we are not competitive we cannot survive," "we must do something to be able to survive," and that if immediate steps were not taken it was probable that the respondent would not be there in the future.[8]

I additionally agree with the judge that even assuming, arguendo, that certain conduct by the Respondent could be construed as an implicit claim of "inability to pay," the Respondent subsequently made it clear, in its March 11 letter to the Union, that it had not been and was not asserting such a claim. See *Central Management Co*., supra. Thus, the Respondent expressly stated that "I advised that the Company was losing money, *not* that the Company's financial condition precluded it from agreeing to the Union wage proposal. No claim of financial inability, explicit or implicit was made." The Respondent reiterated this position on March 27 when it wrote the Union that "[a]t no time did I or any Company official claim a present inability to pay or a prospective inability to pay during the life of the contract being negotiated."

My colleagues seek to distinguish *Central Management Co*. They say that the employer there did not deny making a prior claim of inability to pay. Rather, according to my colleagues, the employer acknowledged making that claim and then withdrew the claim. My colleagues argue that the Respondent here did not change its position, i.e., it always claimed an inability to pay. In my view, as discussed above, the Respondent never claimed an inability to pay. In order to eliminate any possible confusion on the point, the Respondent subsequently reiterated the point even more clearly. Further, even if the Respondent is now considered by my colleagues as previously claiming an inability to pay, the Respondent, (as in *Central Management*) withdrew from that position.

Finally, no exceptions were filed to the judge's finding that the Respondent's March 11 and March 27 letters constituted retractions of any Respondent claim of "inability to pay."[9] Thus, the Respondent was not required to provide the requested financial information. Accordingly, I find no merit to my colleagues' decision and or-

[8] Moreover, concurrent with these dire predictions in *ConAgra*, the employer announced that it would permanently lay off 40 employees, and informed the union that it was considering shipping its product to Puerto Rico (which would render the facility at issue extraneous). Contrary to the contention of my colleagues, there is a large distinction between an actual layoff (in *ConAgra*) and the prospect of possible layoff (instant case). The former obviously connotes a more dire present situation.

[9] My colleagues say that the General Counsel did file exceptions as to this finding. They infer this from the General Counsel's exception to the judge's ultimate conclusion that there was no 8(a)(5) violation in the failure to provide the information. However, under Section 102.46 of the Board's Rules, exceptions must be specific. Thus, an exception as to the ultimate legal conclusion is no substitute for an exception as to a specific fact-finding.

der to require the Respondent to provide the Union with financial information.

Based on the foregoing, I find that the Respondent did not violate Section 8(a)(5) by refusing to provide the requested information. Accordingly, I would dismiss the complaint.

Dated, Washington, D.C. August 27, 2001

Peter J. Hurtgen, Chairman

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to provide Amalgamated Transit Union, Local 1614, AFL–CIO with financial information requested in its letter dated February 26, 1997.

WE WILL NOT refuse to bargain in good faith with the Union by changing employees' terms and conditions of employment without first having reached a valid impasse in bargaining with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL provide the Union with the financial information requested by its letter dated February 26, 1997.

WE WILL on request of the Union, rescind all changes in terms and conditions of employment implemented on March 28, 1997 and restore all terms and conditions of employment as they existed prior to the March 28, 1997 implementation, and WE WILL make whole employees adversely affected by the March 28, 1997 implementation, with interest.

LAKELAND BUS LINES INC.

Chevella Brown-Mayer, Esq., for the General Counsel.
Mark E. Tabakman, Esq., for the Respondent.
John Craner, Esq., for the Union.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried in Newark, New Jersey on December 1, 1998. The charge was filed by the Union on March 27, 1997, and the complaint was issued on May 26, 1998. In substance, the complaint alleged

1. That since February 26 1997, the Respondent has failed and refused to provide to the Union requested financial information.

2. That on or about March 28, 1997, the employer implemented its last offer notwithstanding that there was no valid impasse because of the Respondent's refusal to furnish the aforesaid financial information.

It should be noted that the General Counsel concedes that at no time did the Respondent, by any of its representatives, in haec verba, make a claim of inability to pay. The General Counsel asserts that by virtue of the Employer's demand for concessions from existing terms, (regressive demands), statements that it was losing revenue because of competition from New Jersey Transit and statements that it was operating in the red, that such statements in the aggregate, constitute the equivalent of a claim of in ability to pay.

The General Counsel concedes that but for the alleged refusal to furnish the financial information, a valid impasse was reached and therefore the Company would have been within its rights in implementing its last offer.

The Respondent asserts that it was entitled, under prevailing law, to deny the Union's request for financial information as it never claimed that it was unable to pay. It asserts that although it did claim that the loss of ridership did result in a loss of money, it never claimed that its overall operations were not profitable or that it was unable to meet the Union's demands.

The Respondent also asserts that the parties reached an impasse over an issue involving spread time (related to overtime) and that the impasse had nothing to do with the request for and refusal to furnish financial information. In this regard, the Respondent notes that the impasse was reached before the information request was even made.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS OF FACT

I. JURISDICTION

The parties agree and I find that the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Company operates a private bus services in New Jersey and has had a collective-bargaining relationship with the Union for more than 20 years. The most recent contract, covering about 87 drivers, expired on January 31, 1997. Since then, the Company has operated without a contract, having put into effect the terms of its last offer.

Prior to the commencement of negotiations, the State of New Jersey instituted rail service which overlapped some of the routes operated by Lakeland. As a consequence, the Company lost about 500 round trip fares per day. As New Jersey's rail service is highly subsidized and quicker, it is unlikely that the Company could regain these riders. This loss of ridership was known to the Company, the union and the drivers as the parties entered into negotiations.

Negotiations for a new contract commenced in November 1996. The Union's spokesman was attorney John Craner and the Company's spokesman was attorney Desmond Massey. (Both of these individuals have long and extensive experience in labor relations). There were a total of 11 bargaining sessions. The final bargaining session took place on February 21, 1997, and although the parties came close, they did not come to an agreement. It should be pointed out that the General Counsel concedes that but for her allegation that the Company illegally refused to furnish certain financial information, there would have been a valid impasse which would have allowed the Company to implement all or part of its final offer. It should also be noted that if an impasse was reached by February 21, 1997, this occurred *before* the Union requested the information in dispute.

The Union proposed wage increases for the drivers, but this was rejected by the Company which insisted on a wage freeze for an extended period of time. The demand for a wage increase was thereafter dropped and the negotiations focused on the length of time that a wage freeze would be imposed and on other company give-back demands. Thus, the entire focus of the bargaining, from the Union's perspective, was not on an attempt to get more for its members, but on an attempt to defend its current benefits from erosion. One of the crucial give-backs that the Company demanded was a change in the expired contract's spread-time rules which affected the amount of overtime that drivers could earn. The Company wanted to modify these rules in order to reduce overtime and the Union wanted to retain the rules. This was, a critical issue between the parties.[1]

There is no dispute that at every opportunity, the Company's counsel stressed that the Company had lost ridership and was therefore losing money as a consequence. There is, however, a dispute as to the exact nature of this claim. The Union's witnesses testified that at virtually every meeting, Massey said that the Company had lost riders and that the Company was losing money in the sense that it was not profitable. On the other hand, Massey testified that he said that the Company had lost ridership, had lost revenue, but that he never claimed that the Company, as a whole, was losing money or was unprofitable. My sense is that Massey, who impressed me as a credible and careful person, continually referenced the loss of riders and loss of revenue but steered clear of any claim that the Company was not profitable or that it was operating at a loss. On the other hand, given what he did say at almost every meeting, I can understand how the union negotiators would take his remarks as meaning that the Company was not profitable.

As noted above the final bargaining session was held on February 21, 1997. At this meeting, the parties were sequestered in separate rooms and John Tesauro, the executive director of the New Jersey State Board of Mediation was there to assist in the negotiations and to transmit offers from one side to the other. By this time, many issues had been agreed to although the spread-time issue remained open and sticky.

John McHale, the Union's president, testified that at the February 21 meeting, the Company unexpectedly came up with an offer of a $500 bonus per man if the Union agreed to, what in effect would be an additional 90-day extension of the already agreed-upon 16-month wage freeze. He and Craner testified that the union negotiators were baffled as to where the Company was coming up with this money, as it had claimed throughout the negotiations that it was losing riders and money. According to them, this put into question their assumption that the Company was being entirely forthright in its lost money claims. The problem that they foresaw was that given the offer of additional money made for the first time on February 21, they would have difficulty facing their membership and convincing them that they did the right thing by making so many concessions based on their acceptance of the Company's lost money claims.

Massey's version of this meeting, although generally consistent with the above, is different in only one small detail. He asserts that at one point, Mediator Tesauro suggested that the Company make a concession on the spread-time issue. Massey testified that the employer representatives calculated that the daily cost of the existing spread-time provision was about $4 per day per driver, which resulted in a 1-year cost of about $50,000. Therefore, according to Massey, he told Tesauro that the Company would offer that amount of money, equal to about $500 per employee, as a one-time payment in exchange for the

[1] Under the old contract, spread time relates to the fact that many drivers work in the morning and the evening and have a substantial break in between. If an employee works from 6–9 a.m. and then works from 4–7 p.m. his total worktime is 6 hours but his total time is 13 hours. If the agreed-upon spread time is 11 hours, his overtime begins after the 11th hour and would result in 1 hour at premium pay. But if the spread time was 12 hours, then his overtime would start after the 12th hour and he would receive zero hours of premium pay.

Union's agreement to the Company's spread-time proposal. He states that he did not offer that money in consideration for a further extension of the wage freeze. According to Massey, when Tesauro returned to the company caucus, he said that Union Representative Mike Siano said that the Union would take the money in exchange for an extension of the wage freeze, but would not agree to any change in the existing spread-time rules.

The February 21 meeting was the last bargaining session and it is clear to me that the biggest sticking point was the spread-time issue. That is, had the parties been able to reach an agreement on spread time, there is no doubt in my mind that an agreement would have been reached on that date.

On February 25, 1997, Massey transmitted a letter to the Union enclosing a final offer. On that same day, the Company by its president, sent a letter to its drivers detailing its position. This stated:

> [A]s you know, we have lost 7500 riders per week to New Jersey Transit Rail. However, we are attempting to do it with minimal impact on each of the members of our family, i.e. YOU.
>
> . . . .
>
> For those of you who have been around for a while know, I am not one to "cry wolf." I believe in being honest, and that is just what I am trying to do. Simply stated, we are trying to bring the bottom line back into the black and we are doing this by increasing charters, reducing liability insurance costs and negotiating with NJT for additional lines to utilize our manpower and equipment. . . .
>
> We are simply all doing what must be done, and now, we are asking for help from our LAKELAND FAMILY so we may retain your jobs and get back in the black in the short term and continue to share our good fortune as we have in the past.
>
> Therefore, I ask you to give the enclosed Final Offer your serious consideration and vote YES to ratify it. The future of Lakeland depends on it.

By letter dated February 26, 1997, union attorney Craner set forth his understanding of what had taken place at the February 21 meeting and asked Massey to provide financial information. The letter stated:

> Despite the marathon negotiating session on Friday, February 21, 1997, the parties came close to but did not reach agreement on a new collective bargaining agreement. The stumbling block appears to be the Company's desire for an increase in the spread to 11 ½ hours from the present 11 hours.
>
> The parties had agreed tentatively to a contract expiration date of May 31, 1998. The company wanted the Union to agree to a no-strike—no lock-out clause for an additional 90 days and also was prepared to give each employee a $500 "bonus." It turned out that the $500 was tied to a spread increase and the parties could not agree at that point and the negotiation session terminated.
>
> The Union is having a great deal of difficulty in understanding the position of the company. On the one hand it talks about its financial woes and looks for all types of give-backs and at the same time offers the employees a $500 bonus amounting to approximately $40,000. To the Union, none of this makes sense. And, the reason it doesn't make sense is because the Union has been accepting the representations of the Company as to the extent of the losses it claims are due to the loss of passengers as a result of the rail line which now competes with Lakeland on its 24 line.
>
> Accordingly, since the one-half hour spread seems so critical and the company contends it is sustaining substantial losses, the Union now feels it imperative to ascertain the extent of this loss, if any and wants to have its accountant inspect the company books and records before any further negotiations take place or any "final offers" are put on the table. The Union is prepared to sign whatever confidentiality agreements are necessary and to have its accounting representative sign off as well. Any refusal to allow the Union to see the company financial records will be considered to be an unfair labor practice.

On March 11, 1997, Massey responded to Craner's letter and stated:

> [T]o set the record straight, I advised that the Company was losing money, not that the company's financial condition precluded it from agreeing to the Union wage proposal. No claim of financial inability, explicit or implicit, was made by myself or any company official, nor does your letter, on its face, assert that any Lakeland official/spokesperson made such a representation. Indeed, if the company was positing that it "could not pay," it would have hardly offered the $500 per man lump sum bonus in exchange for the Union's agreement on the 11.5 hour "spread". Your only assertions are that the company claimed it had suffered business losses and those representations entitled the Union to examine the company's books.
>
> Accordingly, under *Truitt,* the Union is not entitled to examine the Company's books. Moreover, the National Labor Relations Board has recently held that an employer who "claims only economic difficulties or business losses or the prospect of layoffs is simply saying that it does not want to pay," as opposed to claiming that it cannot pay, *Nielsen Lithographing Company*, 305 NLRB No. 90 (1991). Thus, as all you claim is that the Company made representations of "substantial losses," you are not entitled to examination of the Company's books even under your jaundiced interpretation of the applicable precedent.

By letter dated March 20, 1997, Craner wrote to Massey as follows:

> In light of your recent letter to me indicating that the Company is not claiming a financial inability to pay, I am at a total loss to understand the present position of the company. On the one hand, Lakeland claims that it is los-

> ing money and needs relief, and on the other hand does not claim a financial inability to negotiate a wage increase.
>
> I think the Company owes the Union an explanation as to why it wants a twenty-one month contract with no wage increase and an increase in the spread time, which would reduce wages, if it has the financial ability to pay a wage increase (which you proposed). If the reason is, as I suspect that the company is losing money, then we have every right to inspect the Company books and records to verify that is the case.
>
> I know that you have a tendency to get all excited when anyone questions "management's motives", but the fact is that your client is, in my view, negotiating in bad faith. I therefore, feel that we have every right to inspect the company books and records since you are, in reality, taking the position that your client claims it is losing money and that is the reason why it seeks a twenty-one month wage freeze and a reduction in wages through the increase of spread time. You are simply trying to disguise this fact with a lot of verbiage that simply makes no sense. In short, if Lakeland is losing money, as they have said to the Union all along, then admit it and let us see the books and records so we can convince our client's members and hopefully conclude the negotiations. The way things are now, we have no evidence to support that alleged financial inability and to the contrary, your letter seems to say just the opposite. We need to know the reasons for the twenty one month contract are and why the need for the increased spread time.

In response, Massey wrote to Craner on March 27, 1997, as follows:

> You evidently neither read my earlier letter nor the NLRB holding in Nielsen. . . . At no time did I or any Company official claim a present inability to pay or a prospective inability to pay during the life of the contract being negotiated. The Board specifically held in Nielsen that employer claims of business losses are not equivalent to a claim of inability to pay and therefore do not trigger an employer obligation to allow examination of its books. As the only assertions you make in your March 20 letter are that the Company claimed it was "losing money," your own statement of the facts supports the Company's position that it has no legal obligation to allow examination of its books.

At some point, the employees of Lakeland voted to reject the Company's final offer and the Company, on or about March 28, 1997, implemented its last offer including the change in the spread-time rules that it had proposed. It also included the one time $500 per employee payment.

Thereafter on October 27, 1997, the Union engaged in a strike and in a leaflet dated October 28, 1997, and distributed to commuters, stated:

> During the course of negotiations, the company claimed that they were losing revenue and needed relief. The union offered to freeze wages for 16 months with a wage increase in the last 2 years of the contract. Lakeland rejected the offer and implemented a 21 month contract with no increase and wage and charter rate cuts.
>
> When A.T.U. Local 1614 requested an audit of their books, Lakeland refused, admitting that they were not, in fact, under any hardship from a loss of revenue, but instead, chose not to offer any increases in wages.
>
> The company has shown contempt for both its employees and passengers. Wage freezes and insensitive and unnecessary cuts in service have taken their toll on the ridership and employee morale.
>
> We apologize for any inconvenience that may result from sporadic work stoppages and we ask for your patience and support during these difficult times. It is our hope that the company will come back to the bargaining table and negotiate a fair and equitable settlement.

III. ANALYSIS

Once a collective-bargaining relationship has been established, both the employer and the Union, in accordance with Sections 8(a)(5), 8(b)(3) and 8(d) are obligated to bargain in good faith. This means that each must negotiate with the intent of reaching an agreement and must reduce to writing and execute any agreement that is reached. *H.J. Heinz Co. v. NLRB* 311 U.S. 514, 526 (1941).

The Act's requirement that both unions and employers bargain in good faith necessarily assumes that each side will act rationally with a legally compelled desire to reach an agreement. On the other hand, Congress did not compel either side to agree to any particular form of agreement and neither the Board nor the Court may "write" the terms of any collective-bargaining agreement in an effort to decide what the parties *should* have agreed to. *H.K. Porter v NLRB*, 379 U.S. 99 (1970), *NLRB v. American National Insurance Co*., 343 U.S. 395, (1952); *The Peelle Co*., 289 NLRB 113 (1988).

The Act's requirement that there be bargaining and that it be in good faith, contains an implied tension. On one hand, bargaining can be undertaken as a contest of brute force (within limits)[2] and on the other hand, a reasoned symposium where the parties undertake reasonable discussion in an effort to compromise and reach the "best" accommodation for all sides.

Given that the law requires that bargaining be conducted in good faith and considering that good faith requires at least some semblance of rationality and reasonableness, the Board and the Courts have recognized early on that there will be situations where a union may ask for, and an employer may be obligated to furnish information so that reasoned discussion can take place. *NLRB v. Whitin, Machine Works*, 217 F.2d. 593,

[2] Industrial warfare is not discouraged under the Act and a union may engage in a strike while an employer may engage in a lockout. There are, nevertheless, limits to the weapons that each side may use. For example, an employer may not discharge employees because they engage in a strike and a union may not engage in certain types of prohibited secondary boycotts.

(4th Cir. 1954) cert. denied 349 U.S. 905. (Requiring the employer to furnish employee wage information during bargaining).

As a general matter, there are two types of bargaining. One type deals with the making of a contract and the other deals with discussions that take place after a contract is executed and involves the enforcement of the contract. Assuming that good faith requires each side to furnish appropriate information,[3] the nature of relevant information will be different depending on whether the parties are negotiating for a new contract or are involved in the discussion of a grievance when one claims that the other may have breached the agreement. For example, it would be hard for me to imagine that a union's request for the entire content of employee personnel folders would be relevant when negotiating a contract. On the other hand, such information could be relevant where a grievance is pending and the union wants to determine if the employee in question has been treated disparately from other similarly situated employees.

Because bargaining takes place in these two separate types of circumstances, there has developed a body of law regarding the duty to furnish information in each. For purposes of negotiating a contract, the starting point is *NLRB v. Truitt Mfg. Co*., 351 U.S. 149 (1956). For cases involving the duty to furnish information in the context of enforcing an existing contract, (grievance handling), one should look at cases such as *NLRB v Acme Industrial Co*., 385 U.S. 432 (1967), and *Detroit Edison Co. v NLRB*, 440 U.S. 301 (1979).

At the outset it should be noted that in the context of contract negotiations, certain types of information are deemed to be presumptively relevant and a union need not separately demonstrate particular relevance to the bargaining. Such information would include inter alia, the names and addresses of the employees in the bargaining unit, their wages, and their existing benefits. In this context, an employer would be required for example to furnish any current payroll records for unit employees and any documents showing any insurance carriers that provide existing medical or pension benefits for these employees. *NLRB v. Whiten Machine Works*, supra.

If one were to consider that the core of collective bargaining is about money, then it would seem logical to conclude that the most relevant information would be how much money was available in the pot. After all, if a Union's objective is to get a bigger piece of the pie, it should have some idea as to how big that pie is. Put another and more prosaic way, it is fruitless to try to get blood from a stone. And it would be equally fruitless for a union to expend time, effort, and perhaps engage in a destructive strike, if there was little if any money available to meet its demands and the expectations of the employees is represents. While a company's financial records may disclose many different things, to the extent that they disclose the extent to which it is operating at a profit or loss, information of that kind would, on its face, seem to be presumptively useful and therefore relevant for the purposes of negotiating a contract.

And yet, financial information has always been treated differently. And one would expect that the rationale for this would be more than the feeling that it is impolite to ask a gentleman how much he earns or how much he has.

In NLRB v. *Truitt Mfg Co*., 110 NLRB 856 (1954), the Board's trial examiner held that the employer bargained in bad faith by refusing to grant a union's request for a wage increase based on its assertion that such an increase would put him out of a competitive position, while at the same time refusing to furnish information to support that position. The Board did not adopt this particular conclusion, but did find that "when an employer seeks to justify the refusal of a wage increase upon an economic basis . . . the Act requires that upon request, the employer attempt to substantiate its economic position by reasonable proof."

On appeal, the Circuit Court (*NLRB v. Truitt Mfg. Co*., 224 F.2d 869, 873 (4th Cir. 1955), refused to enforce the Board's order. In doing so, the Court seemed to rely on the concept of confidentiality as being the basis for denying the information. Moreover, from the tone of the opinion, it seems that the Court assumed that the union's request for financial information was somewhat illegitimate and not intended in good faith. In pertinent part, the court stated:

> The statute requires good faith bargaining with respect to wages and other matters affecting the terms and conditions of employment, not with respect to matters which lie within the province of management such as the financial condition of the company, its manufacturing costs or the payment of dividends. And we do not think that merely because the company has objected to a proposed wage rate on the ground that it cannot afford to pay it, good faith bargaining requires it to open up its books to the union in an effort to sustain the ground that it has taken. If such were held to be the law, demand for examination of books could be used a club to force employers to agree to an unjustified wage rate rather than disclose their financial condition with such confidential matters as manufacturing costs, which could conceivably be used to their great damage.

Although the court of appeals did not explain how the disclosure of financial information, could conceivably be used to

[3] The obligation to furnish information extends to both employers and unions. While as a practical matter most information requests will be made by a union, this does not mean that unions are free of this obligation. For example if a union is seeking to have the employer contribute money to a union run health and welfare fund, the union would clearly have the obligation to furnish the employer, upon request, a copy of the trust agreement, any documents describing the plan and perhaps even certain financial information regarding the plan's fiscal soundness. For examples of cases where unions were required to furnish information to employers see, *Graphic Communications Local 13 (Oakland Press)*, 233 NLRB 994 (1977), enfd. 598 F.2d 267 (D.C. Cir. 1979), and *Plasterers Local 346 (Brawner Plastering)*, 273 NLRB 1143, 1144 (1984).

cause "great damage," it seems that a confidentiality defense was implicitly accepted by all parties in the arguments before the Supreme Court because the basis for the assumption itself is not discussed. Instead, a majority of the Supreme Court held that if the employer, during bargaining, made a claim of inability to pay, then good faith required that the employer produce financial records to support its claim, *(NLRB v. Truitt Mfg. Co.,* 351 U.S. 149 (1956). Stating that each case must turn on its particular facts, the Court's majority also stated at 152–153:

> Good-faith bargaining necessarily requires that claims made by either bargainer should be honest claims. This is true about an asserted inability to pay an increase in wages. If such an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy. And it would certainly not be farfetched for a truer of fact to reach the conclusion that bargaining lacks good faith when an employer mechanically repeats a claim of inability to pay without making the slightest effort to substantiate the claim. Such has been the holding of the Labor Board since shortly after the passage of the Wagner Act. In *Pioneer Pearl Button Co*., decided in 1936, where the employer's representative relied on the company's asserted "poor financial condition," the Board said: "He did no more than take refuge in the assertion that the respondent's financial condition was poor; he refused either to prove his statement, or to permit independent verification. This is not collective bargaining." This was the position of the Board when the Taft-Hartley Act was passed in 1947 and has been its position ever since. We agree with the Board that a refusal to attempt to substantiate a claim of inability to pay increased wages may support a finding of a failure to bargain in good faith. The Board concluded that under the facts and circumstances of this case the respondent was guilty of an unfair labor practice in failing to bargain in good faith. We see no reason to disturb the findings of the Board. We do not hold, however, that in every case in which economic inability is raised as an argument against increased wages it automatically follows that the employees are entitled to substantiating evidence. Each case must turn upon its particular facts. The inquiry must always be whether or not under the circumstances of the particular case the statutory obligation to bargain in good faith has been met. Since we conclude that there is support in the record for the conclusion of the Board here that respondent did not bargain in good faith, it was error for the Court of Appeals to set aside the Board's order and deny enforcement.

Subsequent cases involving requests for financial information, have almost invariably focused on the words used at the bargaining table; the question being whether or not those words amounted to a claim of inability to pay.[4] That is, the focus of the argument has been a semantic one. Although I cannot claim to have read every case and article on this subject, it seems to me that those I have read assume that financial information has an aura of confidentiality. Nevertheless, I have rarely seen any explanation regarding the assumption that disclosure of financial information could pose a danger to a company.[5] And if the assumption is correct, I wonder how it is that thousands of American companies manage to compete successfully in local and global markets while disclosing, in detail, their income and financial statements, on a quarterly basis, to the public via the Securities and Exchange Commission.[6]

Many pieces of information kept by employers are declared to be confidential, but in the context of labor relations, few are accorded a right to secrecy.[7] First, some information such as employee wage, name, and address data are presumptively relevant . Second, even if there is some basis for a confidentiality argument, that contention will fail if there is an overriding interest in disclosing the information. See for example, *Olivetti Office U.S.A. Inc. v. NLRB*, 926 F.2d 181, 188-189 (2d Cir. 1991) (In *Olivetti*, the court also stated that the burden is on the employer to establish confidentiality of relevant information and that this must be done by more than conclusory assertions). Thus, in bargaining cases, the Board and the Courts have often rejected confidentiality claims. See *General Electric Co., v. NLRB*, 466 F.2d 1177 (6th Cir., 1972) (wage data); *NLRB v. Frontier Homes Corp*., 371 F.2d 974 (8th Cir. 1967) (selling price lists); *Curtis Wright Corp. v. NLRB*, 347 F.2d 61 (3d Cir 1965) (job evaluation and wage data). Moreover, even where "confidential information" has legally been refused, there often are special circumstances which can be asserted either for or against a decision requiring disclosure. For example in *United Aircraft Corp*., 192 NLRB 382, 390 (1971) the Board held that doctor's records are not disclosable absent an employee's con-

[4] However, in *Circuit Wise, Inc*., 306 NLRB 766, 768 (1992), the Board held that the company was obligated to furnish financial information not because it pleaded inability to pay, but because it proposed a profit sharing plan. In that context, the Board held that the union was entitled to information regarding to company's past profits so as to be able to evaluate the prospect for future profits upon which the company's proposal was based.

[5] See "The Employer's Duty to Supply Financial Information to the Union When the Employer Asserted an Inability To Pay?—or—(The Boss Says Times Are Tough; How Truitt Is.) 8 Lab. Law. 815 (1992). There the author states among other things; "Management asserts its inherent right to manage and the need for confidentiality to protect its business plans, its competitive position, its customers, its employees, and its credit line."

[6] Assuming for arguments sake, that the Board and the courts decided to be more expansive regarding the requirement to disclose financial information, small companies with limited resources should not, as a practical matter, be required to hire financial officers and be compelled to compile the types of information and reports required by the SEC.

[7] Certain information such as patents, industrial processes, or trade secrets would obviously be considered to be confidential.

sent unless they are needed for a specific grievance. In *Shell Co. v. NLRB* 457 F.2d 615, 619 (9th Cir. 1975), the court held that the employer did not have to furnish employees' names without consent, when it was clearly established that there was a clear and present danger of harassment and violence.

The Supreme Court in *Detroit Edison Co., v. NLRB*, supra., held that where information was truly confidential, the employer's (and its employees') interests in nondisclosure may in certain circumstances trump the fact that the information is plainly relevant to bargaining about a grievance. In that case, the company had a program of giving aptitude tests to employees who applied for certain jobs. When a group of employees failed the test, the union grieved on their behalf. In support of the grievance, the union asked for the test questions and answers and the actual test scores of the individuals. The company refused, but offered instead to furnish the test questions and answers to an independent expert and to provide test scores if consented to by the individuals. The Board and the court of appeals rejected this position and held that the company was required to provide all of the requested information to the union, although the Board did state that the union should not disclose the test questions and answers to other employees. The Supreme Court held that the company met its bargaining obligation by offering to furnish the information in the manner which it proposed, and concluded that if the test questions and answers were disclosed, this would effectively eliminate the efficacy of using the test in the future. It also said that employees might object to having their test scores known and that as this was a legitimate confidentiality concern, the company should be allowed to refuse to furnish that information unless an employee consented. In sum, the Court concluded that where there was information which was of a nature that its disclosure would demonstrably be harmful to the employer and/or its employees, then such information may be considered confidential and the right to withhold it must be overweighed by the necessity for its disclosure

The Respondent relies heavily on the Board's opinion in *Nielsen Lithographing Co*., 305 NLRB 697 (1991). While arguing that the facts in the present case are distinguishable from those in *Nielsen*, the General Counsel also argues that the Board should reconsider that decision and adopt the dissenting views of the Board's then Chairman Stephens who stated at 705:

> The financial information requested by the Union could either substantiate or tend to disprove the [Employer's] contention that the employees' wages and benefits were responsible for the continuing loss of their jobs. This, in turn might give the Union a basis for reassessing, and possibly altering, its own bargaining posture. It would know whether there was a source of funds for continued payment of wages and benefits of current employees. The Union would also therefore have a basis for recommending a bargaining position to the unit employees - who doubtless would be concerned about both the [Employer's] predictions of continuing job loss and the prospect of smaller paychecks and reduced fringe benefits if [its] demands were agreed to.

In *Nielsen*, the Board's majority, after having its original decision remanded from the circuit court, decided to adopt the opinion of the Seventh Circuit in *NLRB v. Harvstone Mfg. Corp*, 785 F.2d 570 (7th Cir. 1986), as the law on this subject matter. In *Nielsen*, they concluded that a claim of competitive disadvantage was not the equivalent of a claim of a *present* inability to pay and the Board dismissed the contention that the Union was entitled to the disclosure of financial information.

With the exception of *Circuit-Wise*, (described at fn. 4), the Board, since *Nielsen* has concluded in a number of cases that unless the employer's comments at the bargaining table are the equivalent of a claim of present inability to pay, the employer has no obligation to disclose financial information to a union.[8] Moreover, the cases relied on by the General Counsel are, in my opinion, distinguishable from the facts in the present case. Thus, in *Shell Co*., 313 NLRB 133 (1993), the employer was required to furnish financial information when it told the union that its present circumstances at its airport operation were "bad" and a matter of "survival." Clearly, if a claim is being made that the company's circumstances are a matter of "survival" this is tantamount to claiming a present inability to pay. Similarly, the claims in *Stroehmann Bakeries, Inc.*, 318 NLRB 1069 (1995), are the equivalent of a claim of present inability to pay. In that case, the employer told the Union that it had huge losses which it projected to continue, that it was not competitive, and that it remained in business only due to the "deep pockets" of its parent company.[9] The same thing can reasonably said for the facts in *ConAgra Inc*., 321 NLRB 944 (1996), where the company asserted that "the situation is serious and fragile," that "if we are not competitive we cannot survive," and that "we must do something to be able to survive."

The facts in the present case show that at no time during the negotiations did the employer make any claim of inability to pay. Nor did it make any claim that its survival was at stake or that it might not be able to continue in business. While it is true that the company emphasized that the creation of a competing rail line had reduced the number of riders and revenue, this is

[8] In *Buruss Transfer*, 307 NLRB 226, 228 (1992), the Board held that a statement made away from the bargaining table and about 4 months prior to bargaining to the effect that the company could not afford to pay more than it was currently paying, did not amount to a claim of present inability to pay made during bargaining that would trigger the employer's obligation to furnish financial information. See also *Georgia -Pacific Corp*., 305 NLRB 112, 116 (1991).

[9] On appeal, the Second Circuit at *Stroehmann Bakeries. Inc. v. NLRB*, 95 F.3d 218, 223 (2d Cir. 1996), refused to enforce this aspect of the Board's order stating that although the employer used the word "cannot" it was evident from all the circumstances that what he really meant was that he "would not" pay.

not, in my opinion, tantamount to a plea of poverty amounting to a claim of present inability to pay as required by *Nielsen*. Nor, under *Nielsen*, does the fact that the company sought a wage freeze or other give-backs amount to the equivalent of a claim of current inability to pay.

Finally, even if any words by the Respondent's representatives could conceivably be construed as being tantamount to a claim of inability to pay, it is clear that such a claim, if made, was soon retracted when the Company's attorney responded to the union's attorney's request for financial information. See *Central Management Co*., 314 NLRB 763, 769 (1994).

While I have spent a large part of this decision discussing the history of the law dealing with financial disclosure in the context of labor bargaining, it is my opinion that under current Board law, the employer is not obligated to furnish the requested financial information.[10] That being the case, the employer and the Union were at a legitimate impasse after the meeting on February 21, 1997, and the employer was free to implement all or part of its last offer.

CONCLUSION OF LAW

The Employer has not violated the Act in any manner alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. February 22, 1999

[10] The reader might also want to look at; "Rethinking Financial Information Disclosure Under the National Labor Relations Act," 47 Vand. L. Rev 1905. (Nov. 1994).

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.